

Fair Employment and Housing Council



Proposals to Use FEHC Authority
to Protect the Civil Rights of
People with Disabilities in
Conservatorship Proceedings

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www.spectruminstitute.org/fehcc.pdf

Proposals to FEHC

The Problem

Seniors with cognitive challenges, adults with developmental disabilities, and others with mental disabilities caused by injuries and illnesses are targeted by probate conservatorship proceedings.

These proceedings seek to deprive these individuals of fundamental rights and to transfer the authority to make basic life decisions to another person.

Some 43,000 adults with developmental disabilities and another 20,000 seniors and adults with other cognitive disabilities are under an order of probate conservatorship. These cases remain open indefinitely and are often subject to court hearings on disputed issues. Some 5,000 new petitions for conservatorships are filed each year in California.

Because of the nature of their disabilities, most of these individuals are not able to ask the court for accommodations to ensure effective communication and meaningful participation in the proceedings. Most of them are not able to ask for an attorney because they do not understand the proceedings, they are not aware of the value or role of an attorney or the need for one, and therefore do not request one. Most of them have cognitive disabilities that prevent them from giving a knowing and voluntary waiver of an attorney.

The judicial branch [erroneously](#) believes that if a request for accommodation is not made, disability accommodations need not be provided.

As a result, these involuntary litigants are processed through judicial proceedings – sometimes without an attorney and sometimes without ever being present in court – thereby being deprived of effective communication and meaningful participation in the proceedings.

When they are assigned an attorney, many of these

lawyers are not properly trained to represent clients with developmental or other cognitive disabilities. The attorneys often have a conflict of interest due to court rules giving them a dual role to represent the client and also assist the court in resolving the case. Because of the lack of performance standards and monitoring some of them violate ethical duties and rules of professional conduct.

All of this occurs because of the cognitive disabilities of the clients which preclude the clients from understanding that the lawyer is violating ethics or professional standards. Lawyers would not engage in such behavior while representing clients without cognitive disabilities. Because of the nature of their disabilities, these clients are not able to complain to the court, the State Bar, or to the Department of Fair Employment and Housing under Government Code Section 11135.

Disability Rights Laws

Title II of the Americans with Disabilities Act applies to state and local courts. Government Code Section 11135 incorporates the provisions of Title II, including DOJ regulations and federal judicial precedents, to entities that receive state funds. Superior courts receive state funds as do many court-appointed attorneys.

Title II of the ADA requires a public entity to provide accommodations to those who use its services when the entity knows the person has a disability that adversely affects communication and meaningful participation in the service. DOJ regulations and federal case law make it clear that the ADA does not require a request to be made in order for the duty to accommodate to exist.

The Department of Fair Employment and Housing has jurisdiction to enforce the ADA and to investigate Title II violations by public entities, including by courts and court-appointed agents.

The Department of Fair Employment and Housing is itself subject to the requirements of the ADA and Section 11135. It must take steps to ensure that its services are accessible to people with disabilities. This includes its complaint and investigation process. DFEH should be ensuring that these services are available to people whose cognitive disabilities preclude them from understanding that their ADA rights have been violated or interfere with their ability to file a formal complaint with DFEH on their own.

DFEH does not have a rule allowing a third party, such as a disability rights advocacy organization, to file a complaint on behalf of victims of discrimination whose disabilities preclude them from filing a complaint on their own. As a result, a large class of people with cognitive disabilities, including those who are involuntary litigants in probate conservatorship proceedings, do not have access to the complaint and investigation services of DFEH.

As the chief law enforcement office of the state, the California Attorney General has the authority to make sure that state laws are being faithfully executed. The state Department of Justice has a Civil Rights Enforcement Section. Unfortunately, the Attorney General and the Department of Justice will not use their authority and their resources to help victims of discrimination when the civil rights violations are being perpetrated by state entities.

The Attorney General and the DOJ have a conflict of interest because they advise and defend these state agencies. As a result, victims of disability discrimination perpetrated by state entities, including state courts, do not receive help from the AG or DOJ. This leaves DFEH as the only administrative recourse within the executive branch.

FEHC Authority

Government Code Section 12935, as amplified by Section 11104 of Title II of the California Code of Regulations, authorize the Fair Employment and Housing Council to engage in the following activi-

ties: (1) to adopt rules to interpret and implement Section 11135 and other provisions of Article 9.5 of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code; (2) to create advisory agencies to study problems of discrimination and make recommendations to the Council for the development of policies and procedures; (3) to hold hearings into matters involving discrimination and civil rights; (4) to make inquiries and issue findings on issues involving discrimination problems; and (5) to issue publications and reports.

Proposals to FEHC

Adopt New Rules. FEHC should adopt new rules under Article 3 of Subchapter 6 of Chapter 5 of Division 4.1 of Title II of the California Code of Regulations. This article is titled “Discriminatory Practices Related to Specific Groups Protected by Article 9.5.” The new rules should be included in Article 3 which is titled “Discriminatory Practices Related to Specific Groups Protected by Article 9.5.” (See “Summary of Proposed Rules” on the next page.)

Convene an Advisory Committee. FEHC should convene an advisory committee on the application of the ADA in judicial proceedings involving litigants with cognitive disabilities. The advisory committee should give special attention to the application of the ADA, including the granting of accommodations and modifications, in probate conservatorship proceedings where literally every person targeted by such a proceeding has serious cognitive and communication disabilities.

The findings and recommendations of the advisory committee can be included in publications issued by the FEHC to assist courts and court-appointed lawyers in fulfilling their obligations under the ADA and Section 11135. The advisory committee should include a representative of the judicial branch, State Bar, California Lawyers Association, Association of Public Defenders, and disability rights advocates and attorneys.

Issue Publications. FEHC should issue a publication on the rights of participants in court proceedings under the ADA and the corresponding duties of the courts and court-appointed agents under Section 11135 to provide accommodations and make modifications, even without request, to participants with known disabilities that adversely affect communications and meaningful participation in such proceedings.

Public Hearings. FEHC, or a subcommittee, should hold hearings focusing on civil rights violations in probate conservatorship proceedings. One hearing should be conducted in Oakland and the other in Los Angeles. There are victims and advocates in both locations with experience and knowledge in this area. A summary of the hearings should be published in a report made available to the public as well as elected officials in all three branches of government.

Proposal to DFEH

The DHEF should adopt a new rule designed to make its complaint and investigative services accessible to victims of discrimination who have cognitive and communication disabilities that preclude them from filing a complaint on their own behalf. The rule should give third-party standing to file complaints for such victims to disability rights advocacy organizations that become aware of discriminatory practices.

Third-party standing is especially appropriate where the violations of Section 11135 are due to undisputed policies and practices affecting classes of people. Advocacy organizations should be given standing to file complaints with DFEH for systemic violations of Section 11135 even when individuals who are adversely affected are unable to file complaints due to the nature of their disabilities. Such a rule on third-party standing may be required under the ADA and Section 11135.

DFEH should also acknowledge its own authority, even without a specific complaining party, to

enforce Title II of the ADA (via Section 11135). Just as the federal DOJ can investigate violations and sue without a specific complaint, so too does DFEH have such powers. The Legislature intended that ADA enforcement in California be as strong, if not stronger, than federal law. Federal case law permits administrative enforcement of Title II without an individual complaint. ([United States v. Florida](#), No. 17-13595 (11th Cir. 2019))

Summary of Proposed Rules

The following rules should be included in Article 3 which is titled “Discriminatory Practices Related to Specific Groups Protected by Article 9.5.”

Communication. A current rule states: “It is a discriminatory practice where a recipient of State support fails to take appropriate steps to ensure that communications with their applicants and beneficiaries are available to persons with impaired vision or hearing.” (2 CCR § 11190) This rule should be amended to add “or who has a cognitive disability that adversely affects communications.”

Accommodations. A new rule should be added which states: “It is a discriminatory practice where a recipient of State support fails to take appropriate steps to offer accommodations, even without a request, to a recipient of services who has known disabilities that adversely affect his or her ability to have meaningful participation in the service without such an accommodation.”

Requests. A new rule should specify that it is a discriminatory practice where a recipient of State support issues written or verbal statements to its employees, agents, or participants in its services that a request is required in order for an accommodation to be provided. A state supported program or service must offer and provide accommodations for obvious or known disabilities that interfere with effective communications or meaningful participation in the program or service.



Fair Employment and Housing Council

Authorized Functions Pertaining to Disability and Government Services

The Fair Employment and Housing Council promulgates regulations that implement California's employment and housing anti-discrimination laws. It also conducts inquiries and holds hearings on civil rights issues confronting the state. (FEHC Webpage)

Since 2013, the Department of Fair Employment and Housing has housed the Fair Employment and Housing Council (FEH Council), a body that issues regulations to ensure that the FEHA and other laws enforced by the Department are interpreted and implemented in a way that is fair and that protects the public to the full extent of the law. (DFEH Website) One of the "other laws" is Government Code Section 11135 which requires state-funded entities to comply with Title II of the Americans with Disabilities Act and to avoid discrimination against people with disabilities.

Council Members

Government Code Section 12903 creates within the Department of Fair Employment and Housing a Fair Employment and Housing Council. Each of the Council's seven members is appointed by the Governor with the advice and consent of the Senate. The Director of the Department of Fair Employment and Housing serves as an ex-officio member of the Council.

Council Functions

Government Code Section 12935 authorizes the Council to engage in the following functions:

Rule Making: It may adopt, amend, and rescind suitable rules, regulations, and standards that interpret, implement, and apply all provisions of Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code. The Council has adopted regulations identifying specific discriminatory practices. (2 CCR Sec. 11159) Regulations on physical access and hearing disabilities are plentiful. Regulations on mental disabilities are absent.

Advisory Agencies: It may create advisory agencies and empower them to study the problems of discrimination and to make recommendations to the Council for the development of policies and procedures except for procedural rules pertaining to the investigatory functions of the Department.

Issue Publications: The Council is authorized to issue (1) publications; (2) results, inquiries and research; and (3) reports to the Governor and the Legislature that will minimize unlawful discrimination and advance civil rights in the state.

Hold Hearings: The Council is authorized to hold hearings.

Make Inquiries and Issue Findings: Section 11104 of Title II of the California Code of Regulations authorizes the Council to make inquiries into general discrimination problems and issue informal and formal findings, including published reports.



Disability and Guardianship Project Disability and Abuse Project

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December 27, 2018

Fair Employment and Housing Council
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Re: Request for a Formal Inquiry and Public Hearings

Dear Councilmembers:

Government Code Section 12935 authorizes the Fair Employment and Housing Council to hold hearings and publish the results of inquiries that will tend to minimize or eliminate unlawful discrimination or advance civil rights in the State of California.

Pursuant to this authority, we respectfully request the Council to hold hearings regarding civil rights violations that are occurring to thousands of seniors and people with disabilities who are required by the government to participate in probate conservatorship proceedings or who are placed under an order of conservatorship by the Superior Court of the State of California.

Our research indicates there may be as many as 60,000 adults in California who are living under an order of conservatorship. Their constitutional and statutory rights have been restricted by the court. About 5,000 new petitions for conservatorship are filed each year in this state. In the name of “protection,” these petitions seek to restrict the civil rights of those who are cited to appear in court.

The law presumes that every adult has the capacity to make his or her own decisions. These conservatorship petitions allege that the adult in question lacks such capacity in one or more areas of decision-making. Capacity to make decisions regarding medical services, place of residence, marriage, social and sexual contacts, finances, occupation, and education, are supposed to be determined by the court in a fair and impartial manner that complies with principles of due process. Because these respondents have actual or perceived cognitive and communication disabilities, they should receive accommodations and modifications from the court, under the Americans with Disabilities Act, to ensure they have effective communication and meaningful participation in the proceedings. Unfortunately, this is not happening in many, if not most, of these cases.

Statutory protections are being ignored. Constitutional rights are being infringed. Accommodations under the Americans with Disabilities Act are not even considered by the court or other participants in these proceedings. No single state official or agency is in charge of the probate conservatorship system. Therefore, these civil rights violations – rooted in systemic deficiencies – are allowed to exist and are likely to continue indefinitely unless there is an intervention. Calling attention to this statewide problem through public hearings by the Council could be an effective intervention.

The Council’s webpage says that the Council “conducts inquiries and holds hearings on civil rights issues confronting the state.” The ongoing violations of the civil rights of seniors and people with

disabilities in probate conservatorship proceedings falls into this category. We urge you to open an inquiry and to hold public hearings that will shine a light on the deficiencies in policy and practice that cause, contribute to, or allow these civil rights violations to occur on such a wide scale basis.

Here is a brief sample of civil rights violations. Stephen, an 18-year-old autistic man, saw his own court-appointed attorney argue that he should lose the right to vote. Gregory, a 26 year-old autistic man, was forced to visit with a parent whom he feared. The parent made Gregory attend church against his will. Gregory's own court-appointed attorney surrendered his First Amendment rights to freedom of association and freedom from religion. Olivia, an 18-year-old woman with autism, was forced into a conservatorship even though less restrictive alternatives were available. The conservator isolated Olivia from relatives and tried to interfere with Olivia's right to appeal. David, age 59, had been an producer at National Public Radio. He experienced a medical condition causing communication impairments. He was stripped of his right to vote in violation of the ADA. Theresa, age 84, is currently being forced into a conservatorship even though a trust would suffice to safeguard her estate. Her court-appointed attorney ignored Theresa's wishes and instead has argued that Theresa should have someone take total control over all aspects of her life. There are also scores of other cases where seniors have been victims of social isolation and financial abuse.

We encourage you to visit the "what's new" page of our website to see the list of officials we have contacted to address this problem in California. <http://disabilityandabuse.org/whats-new.htm> They include the Chief Justice of California, Supreme Court, Judicial Council, Attorney General, Department of Fair Employment and Housing, Department of Developmental Services, Secretary of the Health and Human Services Agency, Secretary of the Business, Consumer Services, and Housing Agency, Senate Judiciary Committee, and United States Department of Justice. Beside one intervention by the U.S. Dept. of Justice on voting rights in 2015, and some pending attorney education rules by the Judicial Council, the response has mostly been that of institutional indifference. A more direct and concerted effort to reform the system is needed in order to minimize or eliminate the serious civil rights abuses that are occurring each day in these legal proceedings.

There is a growing chorus of voices raising concerns about the conservatorship system and demanding reform. For example, a complaint was filed recently against the Sacramento Superior Court by Spectrum Institute, California Advocates for Nursing Home Reform, and The Arc of California alleging that the court's failure to appoint counsel to represent conservatees and proposed conservatees violates the ADA and Government Code Section 11135. A group of people who have been victimized in conservatorship proceedings in Orange County are holding a rally there in early January. With the help of Alameda County Supervisor Nathan Miley, another group of probate conservatorship civil rights victims are holding an event in Oakland on January 11.

A formal inquiry by the Council, and public hearings that shine a light on the problems we have described above, would help immensely. We therefore urge the Council to exercise the authority it has been given by the Legislature to address these issues during public hearings.

We would like to discuss this matter with the Council or its staff. Please let us know how the Council would like to proceed in response to our request.

Respectfully,



Thomas F. Coleman
Legal Director